Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1999

REYNALDO Y. TREVINO,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Fifth Circuit properly applied the applicable standard in denying the Petitioner a certificate of appealability on the issue of the Petitioner being denied effective assistance of counsel at trial and sentencing. **Strickland v. Washington, 466 U.S. 668 (1984); Moore v. Johnson, 101 F.3d 1069 (5th Cir. 1996); United States v. Garcia, 77 F.3d 857 (5th Cir. 1996); United States v. Segler, 37 F. 3d 1131 (5th Cir. 1994); United States v. Placente, 81 F.3d 555 (5th Cir. 1996).**

2. Whether the Court of Appeals for the Fifth Circuit properly applied the applicable standard in denying the Petitioner a certificate of appealability on the issue of the Petitioner being denied effective assistance of counsel on direct appeal **Strickland v. Washington, 466 U.S. 668 (1984); Moore v. Johnson, 101 F.3d 1069 (5th Cir. 1996); United States v. Riascos, 76 F.3d 93 (5th Cir. 1996); United States v. Gipson, 985 F.2d 212 (5th Cir. 1993); Mack v. Smith, 659 F.2d 23 (5th Cir. 1981).**

3. Whether the Court of Appeals for the Fifth Circuit properly applied the applicable standard in denying the Petitioner a certificate of appealability on the issue of the Petitioner's conviction being obtained by the use of evidence seized pursuant to an unlawful search and seizure of his residence and safety deposit box. **United States v. Leon, 468 U.S. 897 (1984); United States v. Green, 634 F.2d 222 (5th Cir. 1981); United States v. Craig, 861 F.2d 818 (5th Cir. 1988); United States v. Satterwhite, 980 F.2d 317 (5th Cir. 1992); United States v. Pigrum, 922 F. 2d 249 (5th Cir. 1991).**

LIST OF PARTIES

The parties to the proceedings below and in this Court are Petitioner, **REYNALDO Y. TREVINO**, and Respondent, **UNITED STATES OF AMERICA.**

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

REYNALDO Y. TREVINO,
Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioner, REYNALDO Y. TREVINO, respectfully prays that a Writ of Certiorari issue to review the Order of the Court of Appeals for the Fifth Circuit in this case, dated August 20, 1999.

OPINION BELOW

The Order of the United States Court of Appeals for the Fifth Circuit is not to be reported, but is attached hereto as Appendix "H".

JURISDICTION

The Order of the United States Court of Appeals for the Fifth Circuit was entered on August 20, 1999. The jurisdiction of this Court is invoked pursuant to **28 U.S.C.A. sec. 1254(l)(1993).**

STATUTES AND RULES INVOLVED

United States Code Title 28 Section 2253:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

On August 24-27, 1993, Petitioner was tried in United States District Court for the Western District of Texas, Pecos Division on an eight (8) count indictment styled "United States of America vs. Ruben Chapa-Ybarra et. al. No. P-93-CR-54, which indictment named the Petitioner in counts 2 (conspiracy to possess with intent to distribute in excess of 100 kilograms of marijuana), 4 (possession with intent to distribute marijuana), and 5 (possession with intent to distribute marijuana). On August 27, 1993, the jury returned a verdict of guilty as to count 2, 4, and 5 charged against the Petitioner.

On November 1, 1993, a sentencing hearing was conducted, and the court committed the Petitioner to the custody of the United States Bureau of Prisons to be imprisoned for a term of three hundred thirty-six (336) months on count 2 and sixty (60) months on each of counts 4 and 5, all to run concurrently with each other.

On November 12, 1993, the Petitioner filed a Notice of Appeal of the judgment of conviction to the United States Court of Appeals for the Fifth Circuit. On February 24, 1995, the United States Court of Appeals for the Fifth Circuit filed an Opinion on the Petitioner's direct appeal affirming the conviction and sentence.

On April 23, 1997, the Petitioner filed a Motion Under 28 U.S.C. sec. 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. On May 19, 1997, the United States District Court for the Western District of Texas, Pecos Division, filed an Order and Advisory which ordered the Respondent to file a responsive pleading. On

September 8, 1997, the Respondent filed its response to Petitioner's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. sec. 2255.

On February 12, 1998 and April 9, 1998 a hearing was conducted by the United States Magistrate for the Western District of Texas, Pecos Division. On May 5, 1998, the United States Magistrate for the Western District of Texas, Pecos Division, filed Proposed Findings of Fact and Recommendations (see Appendix "A"). On May 20, 1998, the Petitioner filed Objections to Proposed Findings of Fact and Recommendations (see Appendix "B"). On June 26, 1998, the United States District Judge for the Western District of Texas, Pecos Division, entered an Order Adopting Proposed Findings of Fact and Recommendation (see Appendix "C").

On August 6, 1998, the Petitioner filed a Notice of Appeal and Request for Certificate of Appealability from the Final Judgment of the court, rendered June 25, 1998 (see Appendix "D" and "E"). On August 20, 1998, the United States District Court for the Western District of Texas, Pecos Division, entered an Order Denying Movant's Request for Certificate of Appealability (see Appendix "F").

The Petitioner filed a Motion for Certificate of Appealability with the United States Court of Appeals for the Fifth Circuit (see Appendix "G"). On August 20, 1999, in an unpublished order, the Court of Appeals for the Fifth Circuit denied Petitioner's request (see Appendix "H").

ARGUMENT

The Order Adopting Proposed Findings Of Fact And Recommendation filed by the United States District Court for the Western District of Texas, Pecos Division on June 26, 1998, adopted the Magistrate Judge's Proposed Findings of Fact and Recommendation in their entirety. (see Appendix "C"). The District Judge further deferred to the credibility determinations made by the Magistrate Judge. The District Judge identified the issues presented by the Petitioner as a complaint of ineffective assistance of counsel during the guilt/innocence phase of the trial, ineffective assistance of counsel at the sentencing phase of the trial and ineffective assistance of counsel during the appellate process. The District Judge discussed the testimony presented at the hearing on Petitioner's Motion Under 28 U.S.C. sec. 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody. Ultimately, the court concluded that the Petitioner's Motion Under 28 U.S.C. sec. 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody should be granted with respect to the Petitioner's claim that he was denied the opportunity to apply to the United States Supreme Court for Writ of Certiorari and denied in all other respects.

Following the filing of a Notice of Appeal and a request for Certificate of Appealability by the Petitioner, the District Court entered an Order Denying Movant's Request for Certificate of Appealability (see Appendix "E"). Therein, the District Court identified ten (10) allegations concerning the effectiveness of Petitioner's counsel at trial, sentencing and on appeal. The Court denied the Petitioner's request for Certificate of Appealability holding that the Petitioner failed to demonstrate that the issues presented

were debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.

Petitioner's Motion for Certificate of Appealability filed in the United States Court of Appeals for the Fifth Circuit was denied for failure to make a substantial showing of the denial of a constitutional right (see Appendix "H").

STANDARD OF REVIEW

Pursuant to **28 U.S.C.A. sec. 2253 (c)(1)(B)**, a Certificate of Appealabiltiy is needed to appeal a Final Order in a **28 U.S.C.A. sec. 2255** proceeding. To obtain a Certificate of Appealability, the Petitioner must make a substantial showing of the denial of a constitutional right. **28 U.S.C.A. sec. 2253 (c)(2)**. The Petitioner need not establish that he will win on the merits in order to obtain a Certificate of Appealability; he need only demonstrate that the questions he raises are debatable among reasonable jurists. **United States v. Garza, 165 F. 3d 312 (5th Cir. 1999); United States v. Rocha , 109 F. 3d 225 (5th Cir. 1997, n.2.).**

THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND SENTENCING

The Petitioner testified at the hearing on the Motion Under 28 U.S.C. sec. 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody that he was initially made aware of the criminal charges preferred against him in the Western District of Texas when agents came to his house on June 23 or 24th of 1993. The Petitioner contacted an attorney, and surrendered to the Marshal's Office in Dallas, Texas the following Monday morning. On July the 1st, 1993, the Petitioner, with his attorney, entered a plea of not guilty at arraignment in the Federal Courthouse in Pecos, Texas. At the time he entered the plea, the Petitioner was not fully aware of what charges were being brought against him.

Following his arraignment, the Petitioner contacted another attorney to represent him in the balance of the criminal proceedings. The Petitioner contacted the other attorney

because of the reputation which he learned from other individuals. The first meeting between the new attorney and the Petitioner was in the first or second week of July, 1993. At that meeting, there was no discussion regarding the nature of the charges or the government's allegations against the Petitioner.

Approximately a week later, the Petitioner paid the retainer fee to the new attorney and was then told that the attorney would need to go to San Antonio to meet with the government regarding his case. The Petitioner did not go with the attorney to the meeting in San Antonio with representatives of the government. Following the meeting, the Petitioner was not shown any documents or evidence which was apparently provided to his attorney. In fact, the Petitioner next met with his attorney when he was picked up at the airport in Midland-Odessa on Monday, August 23, 1993 immediately prior to the beginning of his jury trial.

Prior to the trial beginning, there had been no discussion between the attorney and the Petitioner regarding the strength or weakness of the government's case. There had been no discussion between the attorney and the Petitioner regarding any plea offers made to the Petitioner prior to trial. There had been no discussion between the attorney and the Petitioner regarding the potential guidelines that would apply to the Petitioner's case based upon evidence that might be used against him. The Petitioner actually learned about the evidence which the government had against him during the course of the jury trial. The Petitioner was found guilty by verdict of the jury on August 27, 1993.

During sentencing on November 1, 1993, the total lack of preparation and knowledge of the Petitioner was demonstrated. Specifically, during sentencing, the court stated the following:

... I am not going to try this case again. I heard all this testimony. And from, I didn't hear from Mr. Trevino and I didn't hear from Ms. McDarby, and I didn't hear from Mr. Chapa. But I heard from nearly everybody else involved in this thing. And if I were to grant your motion that would just simply mean I am going to have to hear from all these people again. I heard from them once, there wasn't a whole lot of confusion in my mind about Mr. Trevino's participation in the conspiracy, nor the other counts, and so I am going to deny that request. Simply not just because it was filed late, but I don't have time to go ahead and try this thing, it took me, I don't know, 2 or 3 days to try last time ... We will not have a evidentiary hearing in so far as Mr. Trevino's involvement, of when he became involved in a conspiracy. If Mr. Trevino had worried about that, he could have worried about it a whole lot before today on November 1st. I heard nothing from him, I heard nothing from Ms. McDarby on these matters. I don't penalize defendants for not taking the stand, but I also am not going to grant your request for an evidentiary hearing as requested by you...

... Our problem with that is, Mr. Kuhn, you weren't here when we had the trial...

... Well, I am just not going to give you two bites at the apple. Thank you very much. That was a strategy that was previously made and we are not going back into that...

The Petitioner also called Milton Eugene Robbins to testify regarding his knowledge of the mental and physical condition of his attorney during the relevant time period. Mr. Robbins was initially represented by the same attorney beginning June 1, 1990. Later, Mr. Robbins had an interview with the attorney on October 10, 1993 in the Federal Correctional Institution in Florence, Colorado. At that time, the attorney had been representing Mr. Robbins on peripheral type matters, civil matters, and the direct appeal of his criminal conviction in 1990. At the time of the meeting on October 10, 1993, Mr. Robbins had been having fairly substantial and regular contact with the attorney through the course of the representation. Mr. Robbins had learned that numerous failures to perfect appeal had occurred on behalf of the attorney during his representation of Mr. Robbins. At the time of the meeting on October 10, 1993, the attorney was confronted with the efforts he had made in the representation of Mr. Robbins, and responded that he had inadequately represented Mr. Robbins based upon having been diagnosed with clinical depression, was under a doctor's care, and was being prescribed the drug Prozac. The attorney further stated he had been having trouble with his cases before he went under a doctor's care but was finally getting things back in order in October of 1993. The attorney admitted that during the period of July, August, and September of 1993 that he was having difficulty handling his cases including that on behalf of Mr. Robbins. Pursuant to his difficulties, the attorney had admitted to failing to perform all the duties that an attorney should have in representing Mr. Robbins and other people he represented during that time period. In October of 1993, Mr. Robbins had never met the Petitioner.

The evidence produced at the hearing on Petitioner's Motion Under 28 U.S.C. sec. 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody clearly demonstrated that his trial counsel was ineffective for failing to discuss the full range of options before trial, such as pleading guilty; that trial counsel was ineffective for not discussing any possible defense with the Petitioner before trial; that trial counsel made only a brief oral argument in support of the Petitioner's Motion to Suppress which was the singular defense that the attorney testified to as being advanced in the defense of Petitioner; that trial counsel was ineffective for failing to discuss the full range of punishment with the Petitioner before trial. Unlike the facts pertaining to **United States v. Faubion, 19 F. 3d 226 (5th Cir. 1994)**, herein, the Petitioner was wholly without the benefit of the advice of counsel in making an intelligent decision whether to enter a plea of guilty prior to trial. In **United States v. Faubion**, supra, the Appellant claimed that they had been denied effective assistance of counsel because of being advised to go to trial rather than enter an agreed plea of guilty and obtain a reduction in sentencing for "acceptance of responsibility." **19 F. 3d at 228**. Herein, the Petitioner, was never advised of his options which would include the exposure and sentencing which he was facing should he proceed the trial on a not guilty plea. Further, the Petitioner was never provided an analysis of the evidence against him through his discussions with counsel prior to trial. In the instant cause, unlike the facts in **United States v. Faubion, supra**, Petitioner did challenge, on direct appeal, the failure to grant a two point reduction for acceptance of responsibility.

Under the standard set out in **Strickland v. Washington, 466 U.S. 668 (1984)**, Petitioner has demonstrated that counsel's performance was deficient. Secondly,

Petitioner has shown that the deficient performance prejudiced the defense in failing to allow presentation of any evidence on behalf of the Petitioner, as well as, allowing the sentence imposed on the Petitioner to be greater than otherwise should have been imposed had Petitioner been in full knowledge of the facts and circumstances, as well as, being provided the ability to present evidence in mitigation or defense of the allegations of the government. Compare **United States v. Garcia, 77 F.3d 857 (5th Cir. 1996); United States v. Segler, 37 F.3d 1131 (5th Cir. 1994); Moore v. Johnson, 101 F.3d 1069 (5th Cir. 1981); U.S. v. Placente, 81 F.3d 555 (5th Cir. 1996).**

Prior to sentencing, Petitioner discharged his counsel at trial, and retained Robert J. Kuhn to represent him at sentencing and on direct appeal. The only contact Petitioner had with Mr. Kuhn was prior to being interviewed by the Probation Office in order to prepare the Presentence Investigation Report. The Presentence Investigation Report was prepared on October 13, 1993. Petitioner was sentenced on November 1, 1993. Objections to the Presentence Investigation Report were filed and dealt with without the benefit of an evidentiary hearing. Petitioner was without the assistance of counsel in preparing for sentencing in attempting to obtain witnesses in order to substantiate the objections made to the Presentence Investigation Report since Petitioner was not provided a copy of the Presentence Investigation Report until November 1, 1993, the day of sentencing. Further, counsel did not secure a hearing on the factual allegations of the objections, obviously, since no witnesses were prepared and available.

This failure to be provided assistance of counsel at sentencing prevented the Petitioner from being able to

demonstrate that the firearm found in his residence was not connected to the charged offense as required by **U.S.S.G. sec. 2D1.1, application note 3**.

Ineffective assistance of counsel claim based upon allowing improper application of the sentencing guidelines is a constitutional issue which is cognizable on a proceeding under **28 U.S.C.A. sec. 2255. United States v. Walker, 68 F.3d 931 (5th Cir. 1995)**. In the instant cause, the deficient performance of counsel was the failure to prepare for sentencing with Petitioner in order to martial evidence to demonstrate the lack of the application of a deadly weapon related to the drug conspiracy under **U.S.S.G. sec. 2D1.1, application note 3**. The prejudice is evident in that the Petitioner's sentence would have been significantly less harsh had this two point increase not occurred.

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

On direct appeal, Petitioner was represented by Robert J. Kuhn. Mr. Kuhn perfected the appeal by filing a Notice of Appeal on behalf of the Petitioner and prepared a brief which was filed with the Court of Appeals for the Fifth Circuit sitting in New Orleans, Louisiana. However, the Court of Appeals' decision on the direct appeal dated February 24, 1995, was never conveyed to the Petitioner until Petitioner's counsel advised him of the court's decision by letter dated November 10, 1995. The Petitioner then attempted to file a Motion Pro Se in order to have the mandate recalled and allow the Petitioner to seek a Petition for Writ of Certiorari to the United States Supreme Court. That request of Petitioner was denied by written order of the United States Court of Appeals for the Fifth Circuit on

February 5, 1996. The ability of Petitioner's counsel to communicate with Petitioner during the pendency of the appeal is demonstrated by a letter dated February 8, 1994, which is addressed to the Petitioner with the correct inmate number and location in Oakdale, Louisiana.

The denial of effective assistance of counsel on appeal is protected by the Sixth Amendment to the United States Constitution. **United States v. Riascos, 76 F.3d 93 (5th Cir. 1996); United States v. Gipson, 985 F.2d 212 (5th Cir. 1993); Mack V. Smith, 659 F.2d 23 (5th Cir. 1981).** Just as in **United States v. Riascos, 76 F.3d 93 (5th Cir. 1996)**, wherein the appellant's counsel on appeal failed to file a brief, **United States v. Gipson, supra**, wherein appellant's counsel on appeal failed to inform him of a ten day deadline for filing a Notice of Appeal; and **Mack v. Smith, supra**, wherein appellant's Petition on Appeal mislead appellant by representing that the Notice of Appeal was timely filed when in fact, it was not, Petitioner was completely prevented by counsel's actions from pursuing the direct appeal in this cause either through Motion for Rehearing and/or through Petition for Writ of Certiorari to the Supreme Court of the United States.

THE PETITIONER'S CONVICTION WAS OBTAINED BY THE USE OF EVIDENCE SEIZED PURSUANT TO AN UNLAWFUL SEARCH AND SEIZURE OF HIS RESIDENCE AND SAFETY DEPOSIT BOX

Prior to trial, Petitioner filed a Motion to Suppress Evidence seized pursuant to the execution of two search warrants on Petitioner's residence and safety deposit box on June 25, 1993. The application and affidavit for search warrant and search warrant were issued on June 23, 1993 and

signed by a United States Magistrate for the Northern District of Texas. Prior to the beginning of the guilt/innocence portion of the trial, a brief hearing was conducted by the Court which basically consisted of a short argument by Petitioner's counsel attacking the validity of the application and affidavit for search warrant. The court then denied the Motion to Suppress Evidence and multiple items of evidence seized pursuant to the search warrant which authorizes search of Petitioner's residence were admitted at trial. One item which was seized pursuant to the execution of the search warrant on Petitioner's residence was a key to a safety deposit box. Pursuant to the seizure of that key, another search warrant was obtained for the search of the safety deposit box to which it corresponded at Nations Bank in Garland, Texas. The second search warrant obtained for the search of the safety deposit box was a direct product of the primary search pursuant to the initial search warrant authorizing the search of Petitioner's residence.

In this case, the search warrant for Petitioner's home and the subsequent search of his safety deposit box, (based on finding the key during the search of the house) was issued without sufficient probable cause because the supporting affidavits of the federal agents contained out-dated, stale information and conclusory statements as to the Petitioner's involvement. Just as in **United States v. Green, 634 F.2d 222 (5th Cir. 1981)**, the affidavit supporting the warrant may have demonstrated that the Petitioner was involved in criminal activities, but there was no evidence that was set forth in the affidavits that connected the Petitioner's residence to the criminal activity taking place almost eighteen (18) months beforehand. The affidavits in the instant cause are no more than "bare bones affidavits" which would render official belief in the existence of probable cause entirely unreasonable. **United States v. Craig, 861 F.2d 818 (5th**

Cir. 1988); United States v. Satterwhite, 980 F.2d 317 (5th Cir. 1992); United States v. Pigrum, 922 F.2d 249 (5th Cir. 1991).

In the instant affidavits, the federal agent describes his background in investigating drug cases and his knowledge about the Chapa organization. The affidavits also include uncorroborated unsubstantiated statements by informants and cooperating individuals that the Petitioner was involved in the Chapa organization. Such statements indicate only that Petitioner made payments for delivery of marijuana and accepted delivery of marijuana in 1991. Based on these incidents, the federal agent concluded that seizable items would be found at Petitioner's residence and in the safety deposit box registered to him because (1) Petitioner was a member of the Chapa organization, and (2) persons within drug organizations maintain records in places "such as his person, his residences and offices, motor vehicles, places of operation, or storage facilities." The agent's conclusion that Petitioner continued to be a member of the Chapa organization and not supported by any facts recited in the affidavit. The affidavit sets forth isolated incidents in 1991 that may support an inference that Petitioner was a part of the conspiracy in 1991; however, there were no facts to indicate Petitioner's continued involvement after March, 1992. While the affidavit mentions a more a recent drug investigation, it makes no connection between that investigation and the Chapa organization. There is no allegation that the DEA's periodic surveillance of Petitioner in the six (6) months prior to the issue of the warrant corroborated Petitioner's continued participation in the Chapa investigation. Rather, their surveillance revealed only that Petitioner was seen at his home during the surveillance periods. Therefore, the "bare bones" nature of the affidavit

containing only uncorroborated generalities at a remote time do not meet the good-faith exception to the exclusionary rule **as applied by United States v. Leon, 468 U.S. 897 (1984).** Further, the affidavit wholly fails to establish probable cause for the issuance of a warrant for the search of Petitioner's residence in June of 1993. **United States v. Satterwhite, supra.**

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Petition for Writ of Certiorari be, in all things, granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

Filed
May 05, 1998
Clerk, U.S. District Court
By _____ Deputy

UNITED STATES OF AMERICA	§	
	§	
V.	§	**P-97-CA-031-F**
	§	**P-93-CR-054(2)**
REYNALDO Y. TREVINO	§	

PROPOSED FINDINGS OF FACT AND RECOMMENDATION

BEFORE THE COURT is Reynaldo Trevino's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed pursuant to 28 U.S.C. § 2255. After preliminary review of the Motion, the undersigned United States Magistrate Judge scheduled an evidentiary hearing for February 12, 1998 for the purpose of developing facts related to Trevino's claim of ineffective assistance of counsel.[1] Due the unavailability of a witness for the Petitioner, the hearing was continued to April 9, 1998. After careful consideration of the Motion, evidence presented at hearing and arguments of counsel, it is the recommendation of the undersigned that Petitioner's Motion be granted in part and denied in part.

---

[1] Trevino retained counsel to represent him during these post-conviction proceedings.

FACTS AND PROCEDURAL HISTORY

Reynaldo Trevino was convicted as a result of his involvement in the Ruben Chapalbarra marijuana smuggling conspiracy, which transported marijuana from the Mexican border to the Dallas, Texas area. Trevino used his property in Ellis County, Texas from 1989 through 1991 as a drop site for loads of marijuana, and beginning in 1990 assumed the role of manager of the Dallas end of the operation. He was convicted by a Pecos, Texas jury of one count of conspiracy and two counts of possession. He received a total term of imprisonment of 336 months (336 months for the conspiracy count and 60 months for each substantive count).

Trevino retained Melvin Bruder to represent him at trial. He makes the following complaints about trial counsel:

1) Bruder did not discuss options such as pleading guilty before trial;
2) Bruder never discussed a defense with Trevino;
3) Bruder made only a brief oral argument in support of his motion to suppress,which challenged the search warrants used to search Trevino's residence and safety deposit box;
4) Bruder made no opening statement at trial;
5) Bruder did not discuss potential punishment with Trevino.

After he was found guilty, Trevino retained Robert Kuhn to represent him during the sentencing phase of the proceedings. Trevino contends that Kuhn did not consult with him, did not attend Trevino's interview with the probation office, and did not supply Trevino with a copy of the

PSR until the day of sentencing. Trevino contends that although Kuhn filed objections to the PSR, Trevino did not know about it until the sentencing hearing, and was therefore unable to provide support for the objections. He claims this resulted in a wrongful two-point enhancement for possession of a firearm. Further, Kuhn did not inform Trevino that the 5th Circuit had affirmed his conviction until eight and a half months after the fact, and Trevino was unable to obtain further review from the United States Supreme Court.

DISCUSSION

The Testimony at Hearing

Trevino's trial counsel, Melvin Bruder, testified that he met with Trevino at least three times before the trial. He also met with an Assistant United States Attorney in San Antonio to discuss plea negotiations and examine documents and evidence in possession of the government. Bruder received copies of case reports, photos, and items of evidence seized from Trevino's house and bank box. The items included drug ledgers containing notations of drug and money transactions, and a calendar noting social events such as birthdays as well as drug transaction notations. In addition, nine members of the conspiracy had identified Trevino, as well as attributed statements to him about his management of the operation in the Dallas area.

The government was willing to offer Trevino the opportunity to plea to a crime carrying a ten-year sentence in return for Trevino's cooperation on the rest of the case. Trevino declined the offer, apparently because several co-defendants were family members.

After reviewing the evidence gathered by the government against Trevino, Bruder was not able to devise a viable defense. He believed Trevino's only chance to escape conviction would be to prevail on a motion to suppress evidence, although he also believed that the search warrant would be difficult to attack. He therefore argued that many items seized were beyond the scope of the warrant.

The District Court denied Trevino's motion to suppress, and the case proceeded to trial. Bruder discussed potential witnesses with Trevino, but Trevino did not suggest anyone who could potentially be a witness. During the trial, Bruder and Trevino had dinner together most evenings and discussed the events of the day at that time.

Bruder could not recall whether he had discussed the United States Sentencing Guidelines (USSG) with Trevino, but was "almost certain" that he did not make a prediction about potential punishment other than to state that the ten years offered by the government was half, or less than half, of what Trevino would receive if convicted at trial. Bruder testified that he has been taking Prozac for the treatment of depression since 1991. He believes it did not, and does not, affect his ability to represent clients.

Robert Kuhn, Trevino's counsel at sentencing and on appeal, also appeared and testified at the evidentiary hearing. Although he had requested that he be notified of Trevino's interview date with the U.S. Probation Office, Kuhn was not so notified and so did not attend the interview. He recalled traveling to Pecos to discuss the PSR and potential objections (including the issue of Trevino's role in the offense) with Trevino. However, because the addendum to the PSR did not issue out of the Probation Office until a

couple of days before the sentencing date, Kuhn did not discuss the Probation Office's response to the objections with Trevino until the sentencing date. The district court denied Kuhn's motion requesting a hearing on Trevino's objections to the PSR.

Kuhn filed an appeal, challenging the legality of the search warrant and four parts of his sentence: (1) the base offense level based on an amount of drugs; (2) a two-level enhancement for possession of a dangerous weapon; (3) a three-level enhancement for Trevino's role as supervisor or manager; and (4) denial of a two-level reduction for acceptance of responsibility. The Fifth Circuit affirmed Trevino's conviction and sentence in an unpublished opinion. Some time after the Fifth Circuit issued its opinion, Kuhn became aware that Trevino had not received a copy. Kuhn believed that Trevino was aware of the outcome of the appeal, but had just not received the actual written opinion. Kuhn did not recall whether he advised Trevino of his right to apply to the United States Supreme Court for a writ of certiorari, nor did he recall whether Trevino asked him to pursue further appeal.

Robert Mueller, a special agent for the DEA, testified about the evidence collected by the government against Trevino. The evidence included numerous drug ledgers found in Trevino's home, receipts signed by drivers involved in the conspiracy, and 31 grams of cocaine in the pocket of a shirt found in Trevino's home. Mueller considered Trevino to be a "significant" member of the conspiracy and the case against him to be "extremely strong."

Also testifying was Milton Eugene Robbins, a former client of Bruder. From the testimony, it appears Bruder

represented Robbins and Trevino during an overlapping period of time in the summer of 1993. According to Robbins, on October 10, 1993 Bruder admitted he had "screwed up" on some cases (including Robbins') because of his depression, but he was doing better since he began taking Prozac.

Finally, Trevino himself testified. He stated that he and Bruder had no conversations about the government's 10 year offer or the strength of the case, although Bruder did convey the government's offer to him. Trevino first learned of the government's evidence against him during the trial. He complains that he had no opportunity to rebut the evidence because Bruder never discussed what the evidence at trial would be. When questioned about the evidence produced against him at trial, he was not able to articulate what defense his attorney might have advanced to explain it. He testified that in one instance, a notation on his calendar indicated that he had given money to his niece. He did not know what most of the other notations meant. Nor could he explain the items in the rolltop desk, such as receipts signed by other members of the conspiracy.

The Legal Standard

Not all complaints about a sentence may be brought initially through a section 2255 motion. For a collateral attack under § 2255, "a distinction is drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other." *U.S. v. Pierce*, 959 F.2d 1297, 1300-01 (5th Cir.), *cert. denied*, ___U.S.___, 113 S.Ct. 621, 121 L.Ed.2d 554 (1992). This is because after conviction and exhaustion or waiver of any right to appeal, we are entitled to presume that the defendant stands fairly and finally convicted. *Id* at 1301. Furthermore, "[c]laims which were raised and decided on direct appeal cannot be relitigated on

a motion to vacate pursuant to 28 U. S. C. § 2255. " *U. S. v. Kraemer*, 8 10 F. 2d 173 (8th Cir. 1987). Collateral review is fundamentally different from, and may not do service for, a direct appeal. [2]

Ineffective Assistance of Counsel

For Trevino to establish ineffective assistance of counsel he must meet the two-pronged test set out in *Strickland v. Washington*, 466 U.S. 668, 678, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This test requires first, "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and second, there must be a showing that the deficient performance so prejudiced the defense that the defendant was deprived of a fair trial. Courts should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Id.* at 689, 104 S.Ct. at 2065. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. The court is not interested in grading lawyers' performances; it is interested in whether the adversarial process at trial, in fact, worked adequately.

A. TRIAL COUNSEL

After considering all of the testimony received at the hearing, the undersigned concludes that Trevino's testimony in regard to his trial counsel was not credible. The undersigned therefore finds that Bruder did discuss the plea agreement offered to Trevino by the government, but Trevino did not accept the terms of the agreement. During plea nego-

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[2] *See U.S. v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1592-93, 71 L.Ed.2d 816 (1982); *U. S. v. Drobny*, 955 F. 2d at 994; and *U. S. v. Shaid*, 937 F. 2d at 231.

tiations. Trevino was made aware of the punishment he could receive. Futhermore, Bruder discussed the evidence and potential defenses with Trevino before trial.

As to Trevino's quarrel with the brevity of Bruder's oral argument in support of his motion to suppress, in order for this to amount to ineffective assistance of counsel Trevino must show he was prejudiced thereby. Because the Fifth Circuit found that the search warrants passed constitutional muster, Trevino cannot show that a longer oral argument would have had a different result.

Finally, as to Bruder's decision to forego an opening statement, such a decision falls squarely within the zone of trial strategy. *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984). An attorney's strategic choices, usually based on information supplied by the defendant and from a thorough investigation of relevant facts and law are virtually unchallengeable. *Bryant v. Scott*, 28 F.3d 1411, 1435 (5th Cir. 1994). Given this very deferential standard of review, the undersigned perceives no error, particularly since Trevino has never indicated what defense he had which counsel failed to bring forward.

B. APPELLATE COUNSEL

The undersigned finds Trevino's testimony at hearing in regard to appellate counsel's performance to be credible to the extent that it coincides with the testimony of appellate counsel, Kuhn. Although Kuhn requested that the Probation Office notify him of Trevino's interview date, he was not so notified and therefore did not attend the interview. Trevino does not indicate how counsel's absence prejudiced him, however. Kuhn did consult with Trevino about the PSR and

potential objections. Trevino was aware of the content of the objections to the PSR filed by Kuhn and therefore could have provided support for the objections, if any existed.

However, Kuhn did not inform Trevino that the Fifth Circuit had affirmed his conviction until 8 & 1/2 months after the fact. Trevino was therefore unable to pursue further appellate review. The Fifth Circuit has held that "the contention that [the Defendant] w[as] not given advice concerning certiorari such as is prescribed by our local rule is open to § 2255 review as an aspect of the right to effective counsel mandated by the Rules, the law, and often the Constitution." *Lacaze v. U.S.*, 457 F.2d 1075, 1078 (5th Cir. 1972) (internal citations omitted).

In these circumstances, the Defendant must be given the opportunity to seek a writ of certiorari from the United States Supreme Court. *Id.* Of course, the district court cannot withdraw and then reenter the mandate of the Fifth Circuit Court of Appeals, which is the proper remedy for this type of attorney error. *Id.*; *Pressley v. Wainwright*, 493 F.2d 894 (5th Cir. 1974). The Defendant can, however, file a motion requesting that the Fifth Circuit "withdraw and then reenter its mandate, thereby starting anew the thirty day filing period for certiorari application." *Pressley* at 895.

The Search and Seizure

Trevino's challenge to the district court's denial of his motion to suppress is not cognizable under § 2255. The trial court had the opportunity to review the search warrants and resolved the matter against Trevino. Upon appeal, the Fifth Circuit Court of Appeals analyzed the search warrants

And found that "the district court properly applied the good-faith exception and denied Trevino's motion to suppress." It is a well-settled principle of habeas corpus law that federal habeas relief may not be granted on a Fourth Amendment claim where an opportunity for full and fair litigation of the claim has been provided. *Williams v. Collins,* 16 F.3d 626, 637 (5th Cir. 1994). Trevino has been provided that opportunity.

RECOMMENDATIONS

After due consideration of the Motion, the pleadings on file, evidence and testimony presented at hearing, and the relevant law, it is the recommendation of the undersigned United States Magistrate Judge that the Motion of Reynaldo Trevino to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255 should be **GRANTED** in respect to Trevino's claim that he was denied the opportunity to apply to the United States Supreme Court for writ of certiorari, and **DENIED** in all other respects.

In regard to Defendant's opportunity to seek a writ of certiorari from the United States Supreme Court, the District Court may wish to grant Trevino a specific time period within which to file a motion requesting that the Fifth Circuit withdraw and then reenter its mandate, thereby starting the thirty day filing period. During the authorized time period, Trevino's right to seek the remedy outlined in *Pressley v. Wainright,* supra, could be viewed as sanctioned by the District Court and considered in that light by the Fifth Circuit Court of Appeals. The Defendant's failure to file a motion during the period authorized by the District Court should be viewed as a waiver of the right.

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a copy of this Proposed Findings of Fact and Recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to this report must serve and file written objections within ten (10) days after being served with a copy unless the time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made; the District Court need not consider frivolous, conclusive or general objections. Such party shall file the objections with the Clerk of the Court and serve the objections on the Magistrate Judge and on all other parties. A party's failure to file such objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de nove* determination by the District Court. Additionally, a party's failure to file written objections to the proposed findings, conclusions and recommendation contained in this report within ten (10) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

Signed, this the 4th day of May 1998.

s/s L. STUART PLATT
L. STUART PLATT
U.S. MAGISTRATE JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA,	§	
Respondent	§	
vs.	§	**CAUSE NO.**
	§	**P-97-CA-031-F**
REYNALDO YBARRA TREVINO,	§	**P-93-CR-054(02)**
Petitioner	§	

PETITIONER REYNALDO YBARRA TREVINO'S OBJECTIONS TO PROPOSED FINDINGS OF FACT AND RECOMMENDATIONS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes **REYNALDO YBARRA TREVINO**, Petitioner in the above entitled and numbered cause, pursuant to 28 U.S.C.A. § 636(b)(1) and objects to the Proposed Findings of Fact and Recommendations made by the United States Magistrate Judge filed on May 5, 1998. In support thereof, the Petitioner would respectfully show the court as follows:

1. The Proposed Findings of Fact and Recommendations were served on counsel for petitioner by certified mail received on May 11, 1998.

2. The Petitioner's objections to Proposed Findings of Facts and Recommendations are being timely made within ten (10) days of the service of them upon the Petitioner's counsel.

3. The Petitioner objects to that portion of the Proposed Findings of Fact and Recommendations contained on page 2 wherein the complaints about trial counsel are summarized. Specifically, the Petitioner would show that the complaint regarding the representation of trial counsel, Melvyn Carson Bruder, involved a failure to discuss any investigations conducted by trial counsel with the Petitioner including any plea negotiations made on behalf of Petitioner by trial counsel. This would also include a failure to go over any evidence provided to trial counsel through discovery procedures with the Petitioner prior to trial. The court's statement that the Petitioner complained of the trial counsel's failure to "discuss options such as pleading guilty before the trial" is too limited in its scope.

4. The Petitioner would further object to that portion of the Proposed Findings of Fact and Recommendations wherein the court states that the complaint of Petitioner was that trial counsel, Melvyn Carson Bruder, "never discussed a defense with Trevino" is too general and limited in its content. Specifically, the Petitioner objected to the trial counsel's failure to discuss potential witnesses, both factual and character, to be presented at trial as well as interviewing any potential witnesses as to the extent of the Petitioner's involvement with the other alleged co-conspirators. Further, during the course of trial, trial counsel never discussed with the Petitioner defense strategy at the end of each day of trial or what course the trial was following. This all was tied to the Petitioner's allegation that the trial counsel was detached and disinterested during this entire period of time.

5. The Petitioner would object to that portion of the Proposed Findings of Fact and Recommendations

wherein the court states that the allegation regarding trial counsel, Melvyn Carson Bruder, involving the presentation the Motion to Suppress was deficient. The Petitioner would show that the allegation against trial counsel was that the argument regarding the Motion to Suppress did not include a request for any type of evidentiary hearing other than asking the court to check the "scope of the search" during the testimony of guilt/innocence. Thereafter, trial counsel made no further efforts to actively contest the issue of the scope of the search.

6. The Petitioner would object to that portion of the Proposed Findings of Fact and Recommendation wherein Petitioner's complaint regarding trial counsel was noted to be that no opening statement was made at trial. The Petitioner's complaint was that trial counsel, Melvyn Carson Bruder, reserved his right to make an opening statement knowing that no witnesses were prepared, subpoenaed, or intended to be called after the Government rested its case and chief. Essentially, trial counsel knew that no defense was prepared or intended to be presented.

7. The Petitioner would object to the Proposed Findings of Fact and Recommendations wherein the court omits the Petitioner's complaint regarding trial counsel, Melvyn Carson Bruder's, performance in his handling of cross-examination of prosecution witnesses. The cross-examination consisted in large part of questioning regarding what physical characteristics existed on the ranch owned by the Petitioner in Ennis, Texas, as well as what livestock was present on the ranch.

8. The Petitioner objects to that portion of the Proposed Findings of Fact and Recommendations wherein

thecourt related the Petitioner's complaints regarding the representation of trial counsel, Robert J. Kuhn. Robert J. Kuhn was retained to represent the Petitioner subsequent to the finding of guilt by the jury and prior to sentencing. Petitioner complains that the representation of Mr. Kuhn failed to make available to the Petitioner the ability to present any type of evidence in support of objections that had previously been filed by Mr. Kuhn. It was only upon being presented a copy of the Presentence Investigation Report on the day of sentencing that the Petitioner knew what his exposure at sentencing would be on what objections were made to the report.

9. The Petitioner objects to that portion of the Proposed Findings of Fact and Recommendations contained on page 5 that purports to summarize the testimony of Petitioner at the hearing. Specifically, the Petitioner objects to that portion which states that the Petitioner had no opportunity to rebut evidence because trial counsel, Melvyn Carson Bruder, never discussed what the evidence at trial would be. Specifically, as reflected by the record of the hearing on April 9, 1998, the Petitioner testified that trial counsel never conveyed to him what evidence was produced to him at the discovery meeting he had with the U.S. Attorney in San Antonio prior to trial. Further, the Petitioner objects to that portion of the Proposed Findings of Fact and Recommendation wherein the court stated that when the Petitioner was questioned about evidence produced against him at trial that he was not able to articulate what defense his attorney might have advanced to explain it. The Petitioner's testimony was that he hired trial counsel for the purpose of assisting him in preparing a defense. The Petitioner did not testify that he was prepared to determine through legal methods the way to attack evidence which would be presented

against him. That was why he had hired trial counsel, Melvyn Carson Bruder, based upon what he had heard his reputation was and abilities to assist individuals in defending themselves against criminal charges. Petitioner's complaint was the denial of effective assistance of counsel because he was not presented the opportunity to review evidence prior to trial with the aid of counsel in determining how to best attack the credibility and reliability of evidence presented by the Government. The Petitioner's testimony was simply that he was not involved with members of the conspiracy but on a very limited basis, which defense was not advanced in any way on Petitioner's behalf during the course of the trial.

10. The Petitioner objects to that portion of the Proposed Findings of Fact and Recommendations contained on page 7 wherein the finding was made that the Petitioner's testimony in regard to his trial counsel was not credible. This objection was based on the fact that the testimony of the Petitioner regarding the representation at trial by Melvyn Carson Bruder was not impeached nor contradicted in any way. Specifically, Mr. Bruder could not even recover his file concerning his representation of the Petitioner although requested to do so by counsel for Petitioner significantly in advance of the hearing conducted on February 12, 1998. Mr. Bruder testified without the benefit of a review of his file and his testimony was generalized and conclusory rather than specific as to facts as was the testimony of Petitioner. Further, Petitioner's testimony was corroborated by the testimony of Milton Eugene Robbins regarding the mental and physical state of Mr. Bruder during the time covering the course of representation of Petitioner by Mr. Bruder. All of Mr. Bruder's answers were general rather than specific as was the testimony of the Petitioner. The finding of fact that

the Petitioner's testimony was not credible is not supported by the evidence adduced at the hearings on February 12 and April 9, 1998.

11. The Petitioner would object to that portion of the Proposed Findings of Fact and Recommendations contained on page 7 wherein it is proposed that Mr. Bruder did discuss the plea agreement offered to Petitioner by the Government, but that Petitioner did not accept the terms of the agreement and that the Petitioner was therefor made aware of the punishment he would receive. The further finding was made that Mr. Bruder discussed the evidence and potential defenses with the Petitioner before trial. These findings are not supported by the credible evidence produced at the hearings on February 12 and April 9 as set forth in the proceeding objection. As shown by the transcript of the trial proceedings introduced during the course of the trial on April 9, 1998, at sentencing the trial court made statements indicating the improper trial strategy advanced on behalf of Petitioner. These statements included "I heard all this testimony. And from, I didn't hear from Mr. Trevino...", "If Mr. Trevino had worried about that, he could have worried about it a whole lot before today on November the 1st. I heard nothing from him..." "Well, I am just not going to give you two bites at the apple. Thank you very much. That was the strategy that was previously made and we are not going back into that." Later at the hearing conducted on November 1, the Petitioner stated "I was on only involved in 5 months, you know, from the late part of '91 until January of '92. 1 didn't testify because I didn't know any better, I wasn't advised that well by my attorney." See Petitioners Supplemental Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence By A Person in Federal Custody.

12. The Petitioner objects to that portion of the Proposed Findings of Facts and Recommendations contained on Page 7 wherein it is stated that Petitioner "quarrels" with the brevity of trial counsel's oral arguments in support of his Motion to Suppress The Petitioner's "quarrel" with the trial counsel's actions is not the length of his oral argument, but the manner in which he went about handling the Motion to Suppress evidence. No specific hearing was requested on the Motion to Suppress including attacking the scope of the search. The trial counsel specifically left to the trial court a review of the evidence as it came out during trial regarding the scope of the search. However, the record introduced into evidence clearly demonstrates that the cross examination by the trial counsel did not advance the issue of the scope of the search exceeding that which is constitutionally permissible. Such procedures on behalf of trial counsel could have impacted the result obtained on behalf of Petitioner.

13. The Petitioner would object to that portion of the Proposed Findings of Fact and Recommendations contained on page 7 wherein a finding is made that the trial counsel's decision to forgo opening statement falls squarely within the zone of trial strategy. Specifically, the Petitioner would show the trial strategy cannot be properly determined unless an adequate investigation is conducted by trial counsel in advance of trial. The petitioner would show that the evidence clearly demonstrated that an inadequate investigation and preparation was conducted by trial counsel which would render any alleged trial strategy unintelligent and ineffective.

14. The Petitioner objects to that portion of the Proposed Findings of Fact and Recommendations regarding

the representation by Melvyn Carson Bruder that completely fails to deal with the testimony of Milton Eugene Robbins regarding the physical and mental condition of the counsel during the course of representation of Petitioner. The credible and uncontroverted evidence that the trial counsel was on medication during the time of his representation of the Petitioner yet was experiencing significant physical and mental problems during that period of time clearly impacted the representation of Petitioner. The counsel's admission of later going on a medication that allowed "begin doing good work" clearly impacted the representation of Petitioner by trial counsel Trial counsel's admission that he had fouled up many cases during the time prior to receiving medication also clearly impacted the representation of Petitioner by trial counsel. This condition would also impact the memory and recall of trial counsel of events occurring during representation of Petitioner.

15. The Petitioner would object to that portion of the Proposed Findings and Fact and Recommendations contained on page 8 wherein the finding was made that trial counsel, Robert J. Kuhn, did consult with Petitioner about the Presentence Investigation Report and potential objections and that the Petitioner was aware of the content of the objections to the Presentence Investigation Report and could have provided support for the objections, if any existed. This finding is not supported by the evidence adduced at the hearing on February 12, 1998 and April 9, 1998. The evidence clearly stated that the Presentence Investigation Report is not signed for until the day of sentencing, November 1, 1993. The evidence at trial demonstrated that the Petitioner was not even presented a copy of the Presentence Investigation Report until November 1, 1993. Mr. Kuhn's testimony was generalized and non specific as to when he

would have seen the Petitioner prior to November 1, 1993. That testimony was adduced by the trial counsel that he traveled to Pecos, Tx. and discussed the objections with the Petitioner. There was some testimony regarding potential phone calls with the Petitioner, but this would have been without the benefit of the Petitioner having a copy of the Presentence Investigation Report. At best, the evidence indicated that the trial counsel filed objections to the Presentence Investigation Report without consulting with the Petitioner or preparing for the hearing on the objections by obtaining witnesses and evidence which could be produced to rebut the allegations in the Presentence Investigation Report. Such evidence would have included the limitation of the involvement of the Petitioner with other co-conspirators which would have impacted not only the offense level regarding the use of a firearm, but the offense level involving the amount of drugs involved with the Petitioner.

16. The Petitioner would object to that portion of the Proposed Findings of Fact and Recommendations contained on page 9 wherein the court finds that the Petitioner's challenge to the District Court's denial of his Motion to Suppress is not recognizable under 28 U.S.C. § 2255. This finding is based upon a "well-settled principal of habeas corpus law that federal habeas relief may not be granted on a Fourth Amendment claim where an opportunity for full and fair litigation of a claim has been provided." It is the thrust of the Petitioner's claims that he was not provided a full and fair litigation of the claim based upon the ineffective assistance of counsel. It is on this basis that the Petitioner proceeds in this matter as well as the other allegations within his Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Parson in Federal Custody.

17. The Petitioner would specifically object to that portion of the Proposed Findings of Fact and Recommendations contained on page 9 wherein the United States Magistrate Judge finds that the motion of Petitioner to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255 should be denied in all respects other than the Petitioner's claim that he was denied the opportunity to apply to the United States Supreme Court for writ of certiorari. This objections basis is contained in each of the other objections set forth above. Specifically, the Petitioner believes the findings of fact proposed by the Magistrate are not supported by the evidence as set forth above and therefore would result in granting of the relief requested by the Petitioner within his Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody. This motion is made because Petitioner was denied effective assistance of counsel at trial and the sentencing which would result in a setting aside of the judgment of conviction and the remand of the cause for a new trial.

Respectfully submitted,

/s/ William A. Bratton, III

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ATTORNEY FOR
PETITIONER

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Petitioners objections to Proposed Findings of Fact and Recommendations were forwarded to the Hon. L. Stuart Platt, United States Magistrate Judge and the Hon. Steven L. Snyder, Assistant United States Attorney by Federal Express delivery on this the 19th day of May, 1998.

SIGNED this 19th day of May , 1998.

/s/ WILLIAM A. BRATTON, III
WILLIAM A. BRATTON, III

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS PECOS DIVISION

FILED
JUNE 26 1998

UNITED STATES OF	§	
AMERICA	§	
v.	§	P-97-CA-031-F
	§	P-93-CR-054(2)
REYNALDO Y. TREVINO	§	

ORDER ADOPTING

PROPOSED FINDINGS OF FACT AND RECOMMENDATION

Pending before the Court are the Proposed Findings of Fact and Recommendation of Magistrate Judge Platt with regard to the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255, filed by Petitioner, Reynaldo Y. Trevino. After careful consideration of the Magistrate Judge's Findings and Recommendation, Petitioner's Objections thereto, the record, and the controlling law, the Court has concluded that the Magistrate Judge's Proposed Findings of Fact and Recommendation should be adopted in their entirety. Accordingly, the Court will grant in part and deny in part Petitioner's Motion.

STANDARD OF REVIEW

Magistrate Judge Platt entered his Proposed Findings of Fact and Recommendations on May 5, 1998. A party must serve and file any written objections within ten days after being served with a copy of the same. 28 U.S.C. § 636(b)(1). Where objections are filed, this Court is required to conduct a *de novo* review of the Proposed Findings of Fact and Recommendations. *See* 28 U.S.C. § 636(a)(1) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). Petitioner filed his Objections on May 20, 1998. This Court will therefore conduct a *de novo* review of the Magistrate Judge's Findings and Conclusions.

The Proposed Findings of Fact and Recommendation reflect that Magistrate Judge Platt held evidentiary hearings on Petitioner's Motion on February 12, 1998 and April 9, 1998. This court must defer to credibility determinations made by a magistrate in an evidentiary hearing such as those conducted in the present case. In U.S. v. *Raddatz*, 100 S.Ct. 2406, 447 U.S. 667, 65 L.Ed.2d 424, *reh. den.*, 101 S.Ct. 36, 448 U.S. 916, 65 L.Ed.2d 1179 (1980), the Supreme Court addressed issues related to evidentiary findings made by a magistrate judge pursuant to a prisoner's application for writ of habeas corpus pursuant to 28 U.S.C. §2254. *Raddatz* noted in dictum:

> The issue is not before us, but we assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing

and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach."

Raddatz, 100 S.Ct. at 2415 n.7. In *Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980), the Fifth Circuit Court of Appeals expanded on the issue raised in *Raddatz*:

> [I]n a situation involving the constitutional rights of a criminal defendant, we hold that the district judge should not enter an order inconsistent with the credibility choices made by the magistrate without personally hearing the live testimony of the witnesses whose testimony is determinative.
>
> One of the most important principles in our judicial system is the deference given to the finder of fact who hears the live testimony of witnesses because of his opportunity to judge the credibility of those witnesses. See FED.R.Civ.P. 52(a); *United States v. Oregon Medical Society*, 343 U.S. 326, 339, 72 S.Ct. 690, 698, 96 L.Ed. 978 (1952). The Supreme Court has emphasized, in cases that involve the constitutional rights of criminal defendants, that factual findings may not be made by someone who decides on the basis of a cold record without the opportunity to hear and observe the witnesses in order to determine their credibility. *See, e. g., Wingo v. Wedding*, 418 U.S. 461, 94 S.Ct. 2842, 41 L.Ed.2d 879 (1974); *Holiday v. Johnston*, 313 U.S. 342, 352, 61 S.Ct. 1015, 1018, 85 L.Ed. 1392 (1941).

The principles enunciated in Raddatz and Blackburn

apply in the present case: this Court should defer to the credibility determinations of the magistrate Judge unless it conducts its own evidentiary hearing. Since this Court concludes on the basis of its review of the record that no such independent evidentiary hearing is justified, it will defer to the credibility determinations of the Magistrate Judge.

FACTS AND PROCEDURAL HISTORY

As Magistrate Judge Platt explained, Petitioner Reynaldo Trevino was convicted as a result of his involvement in the Ruben Chapa-Ibarra marijuana smuggling conspiracy, which transported marijuana from the Mexican border to the Dallas, Texas area. Petitioner used his property in Ellis County, Texas from 1989 through 1991 as a drop site for loads of marijuana, and beginning in 1990 assumed the role of manager of the Dallas end of the operation. Petitioner was convicted by a Pecos, Texas jury of one count of conspiracy and two counts of possession. He received a total term of imprisonment of 336 months (336 months for the conspiracy count and 60 months for each substantive count).

Petitioner's habeas petition focuses primarily on the allegedly ineffective assistance provided by his trial counsel. One of the attorneys about whose performance Petitioner complains is Melvin Bruder, trial counsel at the guilt innocence phase of trial. Magistrate Judge Platt described Petitioner's complaints about Bruder as follows:

1) Bruder did not discuss options such as pleading guilty before trial;

2) Bruder never discussed a defense with Petitioner;

3) Bruder made only a brief oral argument in support of his motion to suppress, which challenged the search warrants used to search Petitioner's residence and safety deposit box;

4) Bruder made no opening statement at trial;

5) Bruder did not discuss potential punishment with Petitioner.

After he was found guilty, Petitioner retained Robert Kuhn to represent him during the sentencing phase of the proceedings. Petitioner contends that Kuhn did not consult with him, did not attend Petitioner's interview with the probation office, and did not supply Petitioner with a copy of the PSR until the day of sentencing. Petitioner contends that although Kuhn filed objections to the PSR, Petitioner did not know about it until the sentencing hearing, and was therefore unable to provide support for the objections. He claims this resulted in a wrongful two-point enhancement for possession of a firearm. Further, Kuhn did not inform Petitioner that the Fifth Circuit had affirmed his conviction until eight and a half months after the fact, and Petitioner was unable to obtain further review from the United States Supreme Court.

DISCUSSION

1. The Testimony at the Hearings before Magistrate Judge Platt.

Magistrate Judge Platt heard testimony from Petitioner and from the above-named attorneys, Melvin Bruder and Robert Kuhn, in order to make proposed findings of fact regarding Petitioner's allegations of ineffective assistance.

The Magistrate Judge heard the testimony of Petitioner's trial counsel, Melvin Bruder, who testified that he met with Petitioner at least three times before the trial. Bruder also testified that he met with an Assistant United States Attorney in San Antonio to discuss plea negotiations and examine documents and evidence in possession of the government. Bruder allegedly received copies of case reports, photos, and items of evidence seized from Petitioner's house and bank box. The items included drug ledgers containing notations of drug and money transactions, and a calendar noting social events such as birthdays as well as drug transaction notations. In addition, nine members of the conspiracy had identified Petitioner, as well as attributed statements to him about his management of the operation in the Dallas area.

The government was willing to offer Petitioner the opportunity to plea to a crime carrying a ten-year sentence in return for Petitioner's cooperation on the rest of the case. Petitioner declined the offer, apparently because several co-defendants were family members.

After reviewing the evidence gathered by the government against Petitioner, Bruder was not able to devise a viable defense. He believed Petitioner's only chance to escape conviction would be to prevail on a motion to suppress evidence, although he also believed that the search warrant would be difficult to attack. He therefore argued that many items seized were beyond the scope of the warrant.

The District Court denied Petitioner's motion to suppress, and the case proceeded to trial. Bruder testified that he discussed potential witnesses with Petitioner, but Petitioner did not suggest anyone who could potentially be a witness.

During the trial, Bruder testified that he and Petitioner had dinner together most evenings and discussed the events of the day at that time.

Bruder could not recall whether he had discussed the United States Sentencing Guidelines (USSG) with Petitioner, but was "almost certain" that he did not make a prediction about potential punishment other than to state that the ten years offered by the government was half, or less than half, of what Petitioner would receive if convicted at trial. With respect to Petitioner's allegation that Bruder's physical and mental impairments caused him to be ineffective, Bruder acknowledged that he had been taking an antidepressant depression since 1991. Bruder testified, however, that neither his depression nor the medication affected his ability to represent his clients.

Robert Kuhn, Petitioner's counsel at sentencing and on appeal, also appeared and testified at the evidentiary hearing. Although he had requested that he be notified of Petitioner's interview date with the U.S. Probation Office, Kuhn was not so notified and so did not attend the interview. He recalled traveling to Pecos to discuss the PSR and potential objections (including the issue of Petitioner's role in the offense) with Petitioner. However, because the addendum to the PSR did not issue out of the Probation Office until a couple of days before the sentencing date, Kuhn did not discuss the Probation Office's response to the objections with Petitioner until the sentencing date. The district court denied Kuhn's motion requesting a hearing on Petitioner's objections to the PSR.

Kuhn filed an appeal, challenging the legality of the search warrant and four parts of his sentence: (1) the base

offense level based on an amount of drugs; (2) a two-level enhancement for possession of a dangerous weapon; (3) a three-level enhancement for Petitioner's role as supervisor or manager; and (4) denial of a two level reduction for acceptance of responsibility. The Fifth Circuit affirmed Petitioner's conviction and sentence in an unpublished opinion. Some time after the Fifth Circuit issued its opinion, Kuhn became aware that Petitioner had not received a copy. Kuhn believed that Petitioner was aware of the outcome of the appeal, but had just not received the actual written opinion. Kuhn did not recall whether he advised Petitioner of his right to apply to the United States Supreme Court for a writ of certiorari, nor did he recall whether Petitioner asked him to pursue further appeal.

Robert Mueller, a special agent for the DEA, testified about the evidence collected by the government against Petitioner. The evidence included numerous drug ledgers found in Petitioner's home, receipts signed by drivers involved in the conspiracy, and 31 grams of cocaine in the pocket of a shirt found in Petitioner's home. Mueller considered Petitioner to be a "significant" member of the conspiracy and the case against him to be "extremely strong."

Also testifying was Milton Eugene Robbins, a former client of Bruder. From the testimony, it appears Bruder represented Robbins and Petitioner during an overlapping period of time in the summer of 1993. According to Robbins, on October 10, 1993 Bruder admitted he had "screwed up" on some cases (including Robbins') because of his depression, but he was doing better since he began taking Prozac.

Finally, Petitioner himself testified. He stated that he

and Bruder had no conversations about the government's 10-year offer or the strength of the case, although Bruder did convey the government's offer to him. Petitioner first learned of the government's evidence against him during the trial. He complains that he had no opportunity to rebut the evidence because Bruder never discussed what the evidence at trial would be. When questioned about the evidence produced against him at trial, he was not able to articulate what defense his attorney might have advanced to explain it. He testified that in one instance, a notation on his calendar indicated that he had given money to his niece. He did not know what most of the other notations meant. Nor could he explain the items in the rolltop desk, such as receipts signed by other members of the conspiracy.

2. Motions Brought Pursuant to 28 U.S.C. §2255.

As Magistrate Judge Platt indicated in his Proposed Findings of Fact and Recommendation, not all complaints about a sentence may be brought initially through a section 2255 motion. For a collateral attack under § 2255, "a distinction is drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other." U.S. v. Pierce, 959 F.2d 1297, 1300-01 (5th Cir.), *cert. denied,* _U.S_, 113 S.Ct. 621, 121 L.Ed.2d 554 (1992). This is because after conviction and exhaustion or waiver of any right to appeal, one is entitled to presume that the defendant stands fairly and finally convicted. *Id* at 1301. Furthermore, "[c]laims which were raised and decided on direct appeal cannot be relitigated on a motion to vacate pursuant to 28 U.S.C. § 2255." *U.S. v. Kraemer*, 8 10 F.2d 173 (8-th Cir. 1987). Collateral review is fundamentally different from, and may not do service for, a direct appeal. *See U.S. v. Frady,* 456 U.S. 152, 165, 102 S.Ct. 1592-93, 71 L.Ed.2d

816 (1982); *US. v. Drobny*, 955 F.2d at 994; and *U.S. v. Shaid*, 937 F.2d at 231.

3. Ineffective Assistance of Counsel.

For Petitioner to establish ineffective assistance of counsel, he must meet the two-pronged test set out in *Strickland v. Washington*, 466 U.S. 668, 678, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner must first make "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment;" and, second, there must be a showing that the deficient performance so prejudiced the defense that the defendant was deprived of a fair trial. Courts should initially presume effectiveness, and should always avoid second guessing with the benefit of hindsight. *Id.* at 689, 104 S.Ct. at 2065. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. The court is not interested in grading lawyers' performances; it is interested in whether the adversarial process at trial, in fact, worked adequately.

Trial Counsel

In order to evaluate most of Petitioner's ineffective assistance claims, it was necessary for the Magistrate Judge to hear conflicting testimony regarding trial counsel's preparation and performance at Petitioner's trial. Because the testimony was conflicting, the Magistrate Judge was then required to make credibility determinations in order to render his decision. After considering all of the testimony received at the hearing, Magistrate Judge Platt concluded that Petitioner's testimony in regard to his trial counsel was not credible. Specifically, the Magistrate Judge found that Bruder did discuss the plea agreement offered to Petitioner by the Government, but that Petitioner rejected the terms of that offer. The Magistrate Judge concluded that, during plea negotiations, Petitioner was made aware of the punishment he could receive, and that Bruder discussed the evidence and potential defenses with Petitioner before trial.

As to the brevity of Bruder's oral argument in support of his motion to suppress, the Magistrate Judge concluded that, in order for this to amount to ineffective assistance of counsel, Petitioner had to show he was prejudiced thereby. Because the Fifth Circuit found that the search warrants passed constitutional muster, the Magistrate Judge concluded that Petitioner could not demonstrate that a longer oral argument in support of the motion to suppress would have placed Petitioner in a better position.

The Magistrate Judge also rejected Petitioner's allegation of ineffective assistance based on Bruder's failure to make an opening statement. Such a decision falls squarely within the zone of trial strategy. *Murray v. Maggio*, 736 F.2d 279 (5th Cir. 1984). An attorney's strategic choices, usually

based on information supplied by the defendant and from a thorough investigation of relevant facts and law are virtually unchallengeable. *Bryant v. Scott*, 28 F.3d 1411, 1435 (5th Cir. 1994). Given this very deferential standard of review, the Magistrate Judge correctly concluded that Petitioner's claim gained no support from this allegation. This was especially so, reasoned the Magistrate Judge, since Petitioner complained about the lack of an opening argument but failed to point to any specific defense that should have been presented. Under the second prong of *Strickland*, Petitioner failed to provide specific evidence as to why an opening argument would have changed the outcome.

Appellate Counsel

The Magistrate Judge found Petitioner's testimony at hearing in regard to appellate counsel's performance to be credible to the extent that it coincided with the testimony of appellate counsel, Kuhn. Kuhn testified that he requested to be notified by the Probation Office concerning notify him of Petitioner's interview date, he was not so notified and therefore did not attend the interview. Petitioner does not indicate how counsel's absence prejudiced him, however. The Magistrate Judge concluded that Kuhn did consult with Petitioner about the PSR and potential objections. Petitioner was aware of the content of the objections to the PSR filed by Kuhn and therefore could have provided support for the objections, if any existed.

However, Kuhn did not inform Petitioner that the Fifth Circuit had affirmed his conviction until 8 & 1/2 months after the fact. Petitioner was therefore unable to pursue further appellate review. The Fifth Circuit has held that "the contention that [the Defendant] w[as] not given advice

concerning certiorari such as is prescribed by our local rule is open to § 2255 review as an aspect of the right to effective counsel mandated by the Rules, the law, and often the Constitution." Lacaze v. US., 457 F.2d 1075, 1078 (5th Cir. 1972) (internal citations omitted).

In these circumstances, the Magistrate Judge concluded that Defendant should be given the opportunity to seek a writ of certiorari from the United States Supreme Court. *Id.* Of course, the district court cannot withdraw and then reenter the mandate of the Fifth Circuit Court of Appeals, which is the proper remedy for this type of attorney error. *Id.; Pressley v. Wainwright*, 493 F.2d 894 (5th Cir. 1974). The Defendant can, however, file a motion requesting that the Fifth Circuit "withdraw and then reenter its mandate, thereby starting anew the thirty day filing period for certiorari application." Pressley at 895.

4. The Search and Seizure.

Magistrate Judge Platt concluded that Petitioner's challenge to the district court's denial of his motion to suppress was not cognizable under 28 U.S.C. § 2255. The trial court had the opportunity to review the search warrants and resolved the matter against Petitioner. Upon appeal, the Fifth Circuit Court of Appeals analyzed the search warrants and found that "the district court properly applied the good-faith exception and denied Petitioner's motion to suppress." It is a well-settled principle of habeas corpus law that federal habeas relief may not be granted on a Fourth Amendment claim where an opportunity for full and fair litigation of the claim has been provided. Williams v. Collins, 16 F.3d 626, 637 (5th Cir. 1994). Magistrate Judge Platt concluded that Petitioner had been given that opportunity.

ANALYSIS OF OBJECTIONS

Petitioner has raised fourteen (14) objections to the Proposed Findings of Fact and Recommendation. These objections in large measure reiterate arguments already considered by the Magistrate Judge, and many simply rephrase the same arguments several times. The Court has considered each of Petitioner's fourteen objections and has conducted a de novo review of the record with respect thereto. Based on this review, the Court has concluded that the Magistrate Judge reached the proper findings and recommendations, that Petitioner's objections should be overruled.

Trial Counsel's Handling of Motion to Suppress

In his fifth, twelfth, and sixteenth objections, Petitioner disagrees with the Magistrate Judge's evaluation of the motion to suppress in relation to Petitioner's claim of ineffective assistance of counsel.

In his fifth objection, Petitioner objects to the Magistrate Judge's characterization of Petitioner's compliant regarding trial counsel's handling of the motion to suppress. Petitioner alleges that the issue was not only trial counsel's inadequate oral argument on the motion, but also that trial counsel never requested an evidentiary hearing on the suppression issue but simply requested the trial judge to consider at trial whether the evidence suggested the search was within the scope contemplated by the warrant. Further, Petitioner objects that when the motion to suppress was denied, trial counsel offered no objection.

In his twelfth objection, Petitioner objects to the Magistrate Judge's characterization of the Petitioner's argument regarding the motion to suppress. Petitioner argues that

he did not simply "quarrel" with the length of the oral argument made in support of the motion to suppress, but also with trial counsel's failure to adduce evidence in support of the motion to suppress at the hearing thereon.

In his sixteenth objection, Petitioner challenges the Magistrate Judge's conclusion that the trial judge's unfavorable ruling on the motion to suppress could not be reviewed on a motion brought pursuant to 28 U.S.C. §2255. TheMagistrate Judge cited authority for the principle that "federal habeas relief may not be granted on a Fourth Amendment claim where an opportunity for full and fair litigation has been provided." Petitioner maintains, however, that a "full and fair opportunity" was not provided because of ineffective assistance.

Assuming for the sake of argument that Petitioner's ineffective assistance claim based on the handling of the motion to suppress can be considered on collateral review, the Court concludes that the Magistrate Judge properly evaluated this claim based on the standards for ineffective assistance articulated in Strickland v. Washington, 466 U.S. 668, 678, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner must first make "a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment;" and, second, there must be a showing that the deficient performance so prejudiced the defense that the defendant was deprived of a fair trial. As the Magistrate Judge pointed out, the Fifth Circuit Court of Appeals determined that the warrants were valid, the good faith exception applied, and the district court properly denied the suppression motion. As such, Petitioner cannot show that trial counsel's allegedly deficient performance would have changed the outcome of the trial in any way.

Under the second prong of Strickland, Petitioner cannot establish ineffective assistance based on trial counsel's handling of the motion to suppress.

Trial Counsel Bruder's Preparation:

Deference to Magistrate Judge's Credibility Determinations

In his objections, Petitioner re-urges a number of claims relating to the allegedly poor preparation for trial of trial counsel, Mr. Bruder.

In his third objection, Petitioner alleges that the Magistrate Judge failed to provide a complete summary of Petitioner's complaints regarding the performance of trial counsel. Specifically, Petitioner alleges that the Magistrate Judge omitted Petitioner's complaints that trial counsel failed to discuss plea negotiations with him, and that trial counsel failed to review any evidence with Petitioner that was obtained through discovery from the Government.

In his fourth objection, Petitioner alleges that trial counsel failed to discuss defense witnesses with Petitioner prior to trial, whether character or fact witnesses, which would have helped to establish Petitioner's defense that his involvement with the co-conspirators was limited.

In his ninth objection, Petitioner objects that the Magistrate Judge minimizes Petitioner's complaint regarding his inability to testify effectively on his own behalf at trial. Petitioner alleges that he was unable to do so because trial counsel never explained to him the witnesses that would be called by the Government. This complaint actually relates

to trial counsel's lack of pre-trial preparation and consultation with Petitioner so that he could testify effectively.

In his tenth and eleventh objections, Petitioner objects to the Magistrate Judge's finding that Petitioner's testimony concerning trial counsel's failure to explain the plea agreement was not credible. Petitioner also objects to the Magistrate Judge's finding that trial counsel did, in fact, discuss the evidence and potential witnesses with Defendant/Petitioner prior to trial.

In order to resolve Petitioner's third, fourth,, ninth, tenth, and eleventh objections, the Court would have to make credibility determinations regarding conflicting testimony over Mr. Bruder's level of preparation prior to trial. Because this Court did not conduct the evidentiary hearings on Petitioner's motion, it must defer to the credibility determinations of the Magistrate Judge unless the record indicates these determinations are so questionable as to warrant another evidentiary hearing. *Raddatz*, 100 S.Ct. at 2415 n.7, *Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980). This Court cannot conclude that another evidentiary hearing is warranted. Therefore, it must defer to the credibility determinations of Magistrate Judge Platt with regard to the testimony of trial counsel, Mr. Bruder, and Petitioner, and on this basis concludes that Petitioner's objections three, four, six, nine, ten, and eleven should be overruled.

Trial Counsel Kuhn's Performance:

Deference to Credibility Determinations

In his eighth objection, Petitioner objects that the Magistrate Judge discounted Petitioner's allegation that

Robert J. Kuhn trial counsel subsequent to the finding of guilt and prior to sentencing, failed to provide Petitioner with information regarding the Presentence Investigation Report (PSR), or with a copy of the PSR itself, prior to sentencing. According to Petitioner, this failure precluded him from helping to formulate objections.

In his fifteenth objection, Petitioner objects to the Magistrate's finding that Robert J. Kuhn reviewed the PSR with Petitioner in time for Petitioner to assist in the formulation of objections thereto. According to Petitioner, if he had the opportunity to review the PSR prior to sentencing, he could have helped to lower the offense level determined to apply because he could have offered evidence regarding the use of a firearm, his level of involvement with the co-conspirators, and the amount of drugs associated with Petitioner.

As with the objections concerning the performance of trial counsel, Mr. Bruder, these objections regarding Mr. Kuhn at the post-conviction and pre-sentencing phase depend on testimony about which the Magistrate Judge had to make credibility determinations. Because Magistrate Judge Platt determined that Mr. Kuhn's testimony was credible with regard to his performance, this Court must either defer to this determination or hold its own evidentiary hearing. *Raddatz*, 100 S.Ct. at 2415 n.7, *Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980). The Court concludes that no separate evidentiary hearing is warranted and therefore overrules objections eight and fifteen.

Trial Counsel Bruder's Failure to Make Opening Statement

In his sixth objection, Petitioner objects that the Magistrate Judge mischaracterized the nature of Petitioner's compliant concerning the trial counsel's failure to make an opening argument. The Magistrate Judge cited firmly established authority to suggest that the decision as to whether to make an opening argument is a question of trial strategy that will not support an ineffective assistance claim. However, according to Petitioner, the real issue is that trial counsel was incapable of making an opening argument because he was woefully unprepared for trial: he had prepared no witnesses, had subpoenaed no witnesses, and had prepared no defensive theory. In short, he could not make an opening argument because he had not prepared the case.

Petitioner's thirteenth objection essentially restates his sixth objection. A complete lack of preparation -- whether of witnesses or of a defensive theory rendered trial counsel incapable of making an opening argument.

This Court concludes that, to the extent that these objections rely on contested testimony as to the level of preparation for trial by Mr. Bruder, they are based on testimony on which Judge Platt had to make a credibility determination. As already explained, this Court defers to the credibility determinations of the Magistrate Judge.

Further, to the extent that these objections relate to the specific decision not to make an opening statement, the Court concludes that Magistrate Judge Platt correctly concluded that this was a matter committed to the discretion of the lawyer as trial strategy. *Murray v. Maggio*, 736 F.2d 279

(5th Cir. 1984). An attorney's strategic choices, usually based on information supplied by the defendant and from a thorough investigation of relevant facts and law are virtually unchallengeable. *Bryant v. Scott*, 28 F.3d 14119 1435 (5th Cir. 1994).

Finally, even if the decision regarding opening argument were not considered trial strategy, Petitioner gives no indication that there was a specific argument or arguments that should have been raised in opening argument that would have affected the outcome of the trial in some way. Therefore, this objection fails under the it fails under second prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland*, the Supreme Court held that in order to establish an ineffective assistance of counsel claim, the petitioner must demonstrate both the attorney's deficient performance and prejudice to the defense flowing therefrom. Habeas corpus petitioners seeking relief on this basis bear the burden of demonstrating both of these elements. To satisfy the first *Strickland* prong, a petitioner must demonstrate attorney performance outside the wide range of reasonable professional assistance, and must overcome a strong presumption of adequacy. *Strickland*, 466 U.S. at 699, 104 S.Ct. at 2070. After surmounting this first hurdle, the petitioner further must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694,, 104 S.Ct. at 2068. There is no indication that an opening argument would have affected the result of the proceeding in any way.

Failure to Cross Examine Effectively

In his seventh objection, Petitioner objects to the manner in which he perceives that the Magistrate Judge discounted trial counsel's inadequate cross examination of witnesses. Petitioner cites the example of allegedly tangential questions that trial counsel propounded concerning the physical characteristics of a ranch and the livestock that populated it.

To satisfy the second prong of Strickland, the petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068. Petitioner's allegation regarding ineffective cross examination is global and provides no specific indications that a different approach to cross examination would have affected the outcome of the trial. Objection number seven is overruled.

Mental and Physical Condition of Trial Counsel Bruder

In his fourteenth objection, Petitioner objects to the Magistrate Judge's conclusion regarding the physical and mental condition of trial counsel prior to and during trial. Petitioner notes that credible evidence was presented through the testimony of Milton Eugene Robbins that trial counsel, Melvyn Carson Bruder, was experiencing significant mental and physical impairments that adversely affected his ability to represent Petitioner.

The Court has reviewed the record to evaluate whether the evidence adduced at the hearings demonstrated that Mr. Bruder's depression would have rendered him

ineffective as trial counsel for Petitioner. As the Magistrate Judge indicated in his findings, the testimony of Milton Eugene Robbins regarding Mr. Bruder's condition was mixed. Mr. Bruder represented Robbins and Petitioner during an overlapping Bruder admitted he had "screwed up" on some cases, including Robbins,' because of his depression, but he was doing better since he began taking medication. period of time in the summer of 1993. According to Robbins, on October 10, 1993

In order to allege ineffective assistance on the basis of an attorney's altered mental condition--whether from alcohol, drugs, or mental illness-- Petitioner must specifically link the attorney's condition to his allegedly deficient performance. In *Burnett v. Collins*, 982 F.2d 922 (5th Cir. 1993), the Fifth Circuit Court of Appeals concluded that a petitioner had failed to state a claim for ineffective assistance, even where his attorney had used alcohol during the trial and had entered a treatment facility afterwards, because the petitioner could point to " no specific instances where counsel's performance during trial was deficient because of alcohol abuse." *Burnett*, 982 F.2d at 930. In *Berry v. King*, 765 F.2d 451, 454 (5th Cir.1985), the Fifth Circuit held:

> [U]nder *Strickland*, the fact that an attorney used drugs is not in and of itself, relevant to an ineffective assistance claim. The critical inquiry is whether, for whatever reason, counsel's performance was deficient and whether that deficiency prejudiced the defendant.

Berry, 765 F.2d at 454 (original italics). This Court concludes that Petitioner's allegation regarding Mr. Bruder's mental illness must fail for the same reason that *Burnett* and

Berry rejected claims of ineffective assistance based on alcohol or drug abuse. As in those cases, Petitioner in the present case has failed to provide any specific evidence that Mr. Bruder's depression translated into errors that changed its outcome of the trial to Petitioner's detriment. As the *Burnett* Court concluded: "Burnett's claim is nothing more than a bare assertion that since his counsel abused alcohol, his counsel was ineffective." *Burnett*, 982 F.2d at 930. Petitioner's objection number fourteen is overruled.

General Objection

In his seventeenth objection, Petitioner concludes his objections by challenging the conclusion of the Magistrate that ineffective assistance was confined to the appellate level. Petitioner insists that trial counsel's assistance was also ineffective throughout.

This objection simply summarizes all the objections that Petitioner raised concerning alleged ineffective assistance at the trial phase. The Court has already addressed these objections.

CONCLUSION

The Court has carefully considered the Proposed Findings of Fact and Recommendations of Magistrate Judge Platt, and Petitioner's Objections thereto. After its de novo review of the record, including Petitioner's motion, the pleadings on file, evidence and testimony presented at hearing, and the relevant law, the Court concludes that Magistrate Judge Platt's Findings of Fact and Recommendation is well taken and should be adopted in its entirety.

Accordingly,

It is **ORDERED** that the Motion of Reynaldo Trevino to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255 should be **GRANTED** with respect to Trevino's claim that he was denied the opportunity to apply to the United States Supreme Court for writ of certiorari.

It is further **ORDERED** that Petitioner has until September 1, 1998 to file a motion requesting the Fifth Circuit Court of Appeals to withdraw and then reenter its mandate, thereby starting the thirty day filing period for a petition for writ of certiorari. During the authorized time period, Petitioner's right to seek the remedy outlined in *Pressley v. Wainright, supra*, is sanctioned by this Court. Petitioner's failure to file a motion during the period authorized by the District Court will be viewed as a waiver of the right.

It is finally **ORDERED** that the Motion of Reynaldo Trevino to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. §2255 is **DENIED** in all other respects.

Signed this 25TH day of June, 1998.

S/S ROYAL FURGUSON
ROYAL FURGUSON
U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS PECOS DIVISION

FILED
JUNE 26, 1998

UNITED STATES OF AMERICA	§	
	§	
V.	§	P-97-CA-031-F
	§	P-93-CR-054(2)
REYNALDO Y. TREVINO	§	

FINAL JUDGMENT

On June 25th, 1998, the Court entered an Order Adopting the Proposed Findings of Fact and Recommendations of Magistrtate Judge Platt with respect to the the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255, filed by Petitioner, Reynaldo Y. Trevino. The Court now enters its final judgment pursuant to FED.R.Civ.P. 58.

It is **ORDERED** that the Motion of Reynaldo Trevino to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255 should be **GRANTED** with respect to Trevino's claim that he was denied the opportunity to apply to the United States Supreme Court for writ of certiorari.

It is farther **ORDERED** that Petitioner has until September 1, 1998 to file a motion requesting the Fifth Circuit Court of Appeals to withdraw and then reenter its mandate, thereby starting the thirty day filing period for a petition for writ of certiorari. During the authorized time period, Petitioner's right to seek the remedy outlined in *Pressley v. Wainright*, 493 F.2d 894 (5th Cir. 1974), is sanctioned by this Court. Petitioner's failure to file a motion during the period authorized by the District Court will be viewed as a waiver of the right.

It is finally **ORDERED** that the Motion of Reynaldo Trevino to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. §2255 is **DENIED** in all other respects.

It is further **ORDERED** that the parties will bear their own costs. It is finally **ORDERED** that all other pending motions are **OVERRULED** as moot.

Signed this 25th day of June, 1998.

/s/ ROYAL FURGESON
UNITED STATES DISTRICT
JUDGE

APPENDIX E

IN THE UNITED STATE DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
vs.	§	NO. P-97-CA-031-F
	§	P-93-CR-054(2)
	§	
REYNALDO Y. TREVINO	§	

NOTICE OF APPEAL AND REQUEST FOR CERTIFICATE OF APPEALABILITY

TO THE HONORABLE ROYAL FERGESON, JUDGE, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, PECOS DIVISION:

NOW COMES **REYNALDO Y. TREVINO**, by and through his retained attorney of record, William A. Bratton, 111, and pursuant to 28 U.S.C.A. 2253(a); 28 U.S.C.A. 2107(b); and Rule 22, Federal Rules of Appellate Procedure, and gives this his notice of appeal to the United States Court of Appeals for the Fifth Circuit sitting in New Orleans, Louisiana of REYNALDO Y. TREVINO's appeal of the Final Judgment of the Court, rendered June 25, 1998, in which REYNALDO Y. TREVINO's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C.A. sec. 2255 was granted in part and denied in part. REYNALDO Y. TREVINO requests that the court enter a Certificate of Appealability as to all issues raised and ruled on in his Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody pursuant to

28 U.S.C.A. see. 2255

Respectfully submitted,

/s/ William A. Bratton, III
WILIAM A. BRATTON, III
2828 Routh St., Suite 850
Dallas, Texas 75201
(214) 871-1133) Office
(214) 871-0620 FAX
State Bar No. 02916300
ATTORNEY FOR
REYNALDO Y. TREVINO

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Appeal was forwarded to the Honorable Steven L. Snyder, Assistant United States Attorney, P.O. Box 828, Waco, Texas 76703, by United States Mail this 5th day of August, 1998.

/s/ William A. Bratton, III
WILLIAM A. BRATTON, III

APPENDIX F

FILED AUG 20, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

REYNALDO Y. TREVINO,	§	
Movant	§	
	§	
v.	§	P-97-CA-031
	§	
UNITED STATES	§	
OF AMERICA,	§	
Respondent	§	

ORDER DENYING MOVANT'S
REQUEST FOR CERTIFICATE OF APPEALABILITY

BEFORE THIS COURT is the Notice of Appeal and Request for Certificate of Appealability filed by the Movant, **REYNALDO Y. TREVINO.**

PROCEDURAL HISTORY

A sealed indictment was filed against the Movant on the 8th of June 1993, charging him with conspiracy to possess with intent to distribute marijuana. After a trial by jury the Movant was found guilty and sentenced on the 1st of November 1993, to a term of incarceration of 336 months to be served in the United States Bureau of Prisons. Thereafter, the Movant filed a direct appeal to the United States Court of Appeals for the Fifth Circuit who in turn affirmed Movant's conviction on the 27th of March 1995.

Movant filed this Motion to Vacate, Set Aside or Correct Sentence pursuant to Title 28 U.S.C. § 2255 on the 19th of December 1996, raising the following ten (10) allegations concerning the effectiveness of his counsel at trial, sentencing, and on appeal: 1) his trial counsel was ineffective for failing to discuss the full range of options before trial such as pleading guilty; 2) trial counsel was ineffective for not discussing any possible defense with Movant before trial; 3) trial counsel made only a brief oral argument in support of Movant's motion to suppress; 4) trial counsel made no opening statement at trial; 5) trial counsel failed to discuss the full range of punishment with Movant before trial; 6) Movant's counsel at sentencing was ineffective for failing to meet with Movant; 7) Movant's counsel at sentencing was ineffective for not attending Movant's presentence interview with the probation office; 8) Movant's counsel at sentencing was ineffective for not supplying Movant with a copy of the presentence report until the day of sentencing; 9) Movant's counsel at sentencing was ineffective for not notifying Movant of the substance of the objections to the presentence report; and 10) Movant's counsel on appeal was ineffective for failing to notify Movant that the Fifth Circuit had affirmed Movant's conviction, thus Movant was unable to pursue further appellate review.

On the 25th of April 1997, this Motion was referred to United States Magistrate Judge L. Stuart Platt who held evidentiary hearings on both the 12th of February and the 9th of April 1998. The Magistrate Judge entered a Proposed Findings of Fact and Recommendation on the 5th of May 1998, recommending that Movant's Motion be granted with respect to his claim that he was denied the opportunity to apply to the United States Supreme Court for writ of certiorari, but denied in all other respects.

Movant filed his Objections to Proposed Findings of Fact and Recommendations on the 20th of May 1998. On the 26th of June 1998, the Court entered an Order Adopting Proposed Findings of Fact and Recommendation, specifically finding that Movant's Motion be granted with respect to his claim that he was denied the opportunity to apply to the United States Supreme Court for writ of certiorari, but denied in all other respects. Movant filed this Notice of Appeal and Request for Certificate of Appealability on the 6th of August 1998, asking the Court to grant a certificate of appealability with respect to all issues raised and ruled upon in his Motion.

DISCUSSION

In connection with an appeal involving a dismissed motion under Title 28 U.S.C. § 2255, the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA") amended Title 28 U.S.C. § 2253 to require a movant obtain a certificate of appealability (hereinafter "COA") from a "circuit justice or judge" before an appeal maybe taken from the final order. *United States v. Shunk*, 113 F.3d 31, 33 (5th Cir. 1997) (*citing* AEDPA, § 102; Title 28 U.S.C. § 2253(c)(1)(B)). The United States Court of Appeals for the Fifth Circuit has imposed upon the District Courts the duty to *sua sponte* address the issue of whether a movant under Title 28 U.S.C. § 2255 is entitled to a COA, even in those instances in which the movant has not directed a request for a COA to the District Court. *See Hill v. Johnson*, 114 F.3d 78, 81-82 (5th Cir. 1997); and *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997). To obtain a COA, the movant must make a "substantial showing of the denial of a constitutional right". United States v. Shunk, 113 F.3d at 33 (*citing* Title 28 U.S.C. § 2253(c)(2)). This standard requires the same

showing as that formerly required for obtaining a Title 28 U.S.C. § 2253 certificate of probable cause. *United States v. Shunk*, 113 F.3d at 33 (*referencing United States v. Orozco*, 103 F.3d 389 (5th Cir. 1996); *Drinkard v. Johnson*, 97 F.3d 751, 756 (5th Cir. 1996), *cert. denied*, _ U.S. , 117 S.Ct. 1114, 137 L.Ed.2d 315 (1997)); *See also Lucas v. Johnson*, 132 F.3d 1069,1073 (5th Cir. 1998); *Tucker v. Johnson*, 115 F.3d 276,278 (5th Cir. 1997); *Murphy v. Johnson*, 110 F.3d 10, 11 (5th Cir. 1997); *Else v. Johnson*, 104 F.3d 82, 83 (5th Cir. 1997). To make such a showing, the movant need not show that he should prevail on the merits, but rather must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. *See Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *Hallmark v. Johnson*, 118 F.3d 1073, 1076 (5th Cir. 1997), *cert. denied*, _ U.S. _, 118 S.Ct. 576, L.Ed.2d (1997); *Drinkard v. Johnson*, 97 F.3d at 755; *Washington v. Johnson*, 90 F.3d 945, 949 (5th Cir. 1996), *cert. denied*, _U.S. -1 117 S.Ct. 1259,137 L.Ed.2d 338 (1997); *Newby v. Johnson*, 81 F.3d 567, 569 (5th Cir. 1996); *Harris v. Johnson*, 81 F.3d 535, 538 (5th Cir. 1996), *cert denied*, _U.S. _, 116 S.Ct 1863, 134 L.Ed.2d 961 (1996) ; *Crank v. Collins*, 19 F.3d 172, 174 (5th Cir. 1994), *cert.* denied, 512 U.S. 1214 (1994).

The Movant has failed to demonstrate to this Court that the issues presented are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. Therefore, Movant's Request for Certificate of Appealability shall be denied. Accordingly,

IT IS ORDERED that the Movant's Request for

Certificate of Appealability is **DENIED.**

SIGNED on this 19TH day of August 1998.

/S/ Royal Fergeson
ROYAL FURGESON
United States District Judge
Western District of Texas

APPENDIX G

No. 98-50794

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REYNALDO Y. TREVIN0,	§
Petitioner/Appellant,	§
	§
VS.	§
UNITED STATES OF AMERICA,	§
Respondent/Appellee	§

MOTION FOR CERTIFICATE OF APPEALABILITY

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COMES **REYNALDO Y. TREVINO,** Petitioner/Appellant in the above entitled and numbered cause, and moves the court, pursuant to 28 U.S.C.A.§2253(c), to issue a Certificate of Appealability for his Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by Person in Federal Custody. In support thereof the Petitioner/Appellant would respectfully show the court as follows:

I. On August 24-27, 1993, Petitioner/Appellant was tried in United States District Court for the Western District of Texas, Pecos Division on an eight (8) count indictment styled "United States of America vs. Ruben Chapa-Ybarra et. al. No. P-93-CR-54, which indictment named the Petitioner/Appellant in counts 2 (conspiracy to possess with intent to distribute in excess of 100 kilograms of marijuana), 4 (possession with intent to distri-

bute marijuana), (R. IV 6-7,14-13; Petitioner/Appellant exhibit 1A, 1B, 1C, 1D).

2. On August 27, 1993, the jury returned a verdict of guilty as to count 2, 4, and 5 charged against the Petitioner/Appellant (R. II 296).

3. On November 1, 1993, a sentencing hearing was conducted and the court committed the Petitioner/Appellant to the custody of the United States Bureau of Prisons to be imprisoned for a term of three hundred thirty-six (336) months on count 2 and sixty (60) months on each of counts 4 and 5, all to run concurrently with each other (R. II 349-52).

4. On November 12, 1993, the Petitioner/Appellant filed a Notice of Appeal of the judgment of conviction to the United States Court of Appeals for the Fifth Circuit (R. III 359). On February 24, 1995, the United States Court of Appeals for the Fifth Circuit filed an Opinion on the Petitioner/Appellant's direct appeal affirming the conviction and sentence (R. II 373-84).

5. On April 23, 1997, the Petitioner/Appellant filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. On May 19, 1997, the United States District Court for the Western District of Texas, Pecos Division, filed an Order and Advisory which ordered the Respondent/Appellee to file a responsive pleading (R. III 386-89). On September 8, 1997, the Respondent/Appellee filed its response to Petitioner/Appellant Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255 (R. III 396-409).

6. On February 12, 1998 and April 9, 1998 a hearing was conducted by the United States Magistrate for the Western District of Texas, Pecos Division (R. IV 1- 18 1). On May 5, 1998, the United States Magistrate for the Western District of Texas, Pecos Division, filed Proposed Findings of Fact and Recommendations (R. IV 440-50). On May 20, 1998, the Petitioner/Appellant filed Objections to Proposed Findings of Fact and Recommendations (R. IV 451-56). On June 26, 1998, the United States District Judge for the Western District of Texas, Pecos Division, entered an Order Adopting Proposed Findings of Fact and Recommendation. (R. IV 457-84).

7. On August 6, 1998, the Petitioner/Appellant filed a Notice of Appeal and Request for Certificate of Appealabilty from the Final Judgment of the court, rendered June 25, 1998 (R. IV 487-88). On August 20, 1998, the United States District Court for the Western District of Texas, Pecos Division, entered an Order Denying Movant's Request for Certificate of Appealability (R. IV 489-92).

8. The Petitioner/Appellant respectfully requests the court to grant a Certificate of Appealability pursuant to U.S.C.A. § 2253 (c) on the following issues:

A. The Petitioner/Appellant was denied effective assistance of counsel at trial and sentencing. *Strickland v. Washington* 466 U.S. 668 (1984); *Moore v. Johnson* 101 F. 3d 1069(5th cir. 1996); *United States v. Garcia* 77 F 3d 857 (5th cir. 1996); *United States v. Segler* 37 F. 3d 1131 (5th cir. 1994); *United States v. Placente* 81 F. 3d 555 (5th cir. 1996).

B. The Petitioner/Appellant was denied effective assistance of counsei on direct appeal *Strickland v. Washington* 466 U.S. 668 (1984); *Moore v. Johnson* 101 F. 3d 1069 (5th cir. 1996); *United States v. Riascos* 76 F. 3d 93 (5th cir. 1996); *United States v. Gibson* 985 F. 2d 212 (5th cir. 1993); *Mac V. Smith* 659 F. 2d 23 (5th cir. 1981).

C. The Petitioner/Appellant's conviction was obtained by the use of evidence seized pursuant to an unlawful search and seizure of his residence and safety deposit box *United States v. Leon* 468 U.S. 897 (1984); *United States v. Green* 634 F. 2d 222 (5th cir. 1981); *United States v. Craig*, 861 F. 2d 818 (5th cir. 1988); *United States v. Satterwhite* 980 F. 2d 317 (5th cir. 1992); *United States v. Pigrum* 922 F. 2d 249 (5th cir. 1991).

WHEREFORE, PREMISES CONSIDERED, the Petitioner/Appellant moves this court to grant a Certificate of Appealability pursuant to 28 U.S.C.A. §2253(c) as to the issues setforth herein.

Respectfully Submitted,

/s/ William A. Bratton, III
William A. Bratton,, III
Attorney at Law

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Petitioner/Appellant

APPENDIX H

IN THE UNITED.STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50794
USDC Nos. P-97-CA-031-F &
P-93-CR-54-2

Filed AUG 2 0 1999

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REYNALDO YBARRA TREVINO,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas

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0 R D E R:

Reynaldo Ybarra Trevino moves this court for a certificate of appealability (COA) following the district court's denial of his 28 U.S.C. § 2255 motion to set aside his sentence. This court issues a COA only if the movant makes a substantial showing of the denial of a constitutional riqht. 28 U.S.C. § 2253(c)(2). Trevino fails to make this required showing with his claims that he received ineffective assistance of counsel at trial and on appeal and that his conviction was obtained using evidence seized in violation of the Fourth Amendment. Accordingly, Trevino's request for a COA is DENIED.

/s/ Harold R. DeMoss, Jr
HAROLD R. DeMOSS, JR.
UNITED STATES CIRCUIT JUDGE

A true copy
Test:
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ Debbie Kranz
Deputy
New Orleans, Louisiana Aug 20 1999